



**Kunga (Suing on behalf of the Estate of Benedict Munini Kimuma) v Kimuma  
(Environment & Land Case 34 of 2018) [2022] KEELC 2785 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2785 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 34 OF 2018**

**CG MBOGO, J**

**JULY 6, 2022**

**BETWEEN**

**JOSEPH MUTUKU KUNGA ..... PLAINTIFF**

**SUING ON BEHALF OF THE ESTATE OF BENEDICT MUNINI KIMUMA**

**AND**

**ONESMUS KEESI KIMUMA ..... DEFENDANT**

**RULING**

1. The application for determination is dated 30<sup>th</sup> March, 2021 and was filed under certificate of urgency. It is brought under Order 83 (1), 51 Rule 1 of the *Civil Procedure Rules, 2010* (CPR), Sections 1A, 1B & 3A of the *Civil Procedure Act* and all other enabling provisions of the Law. It seeks;
  - a. That this Honorable Court be pleased to grant leave to the defendant/applicant to amend his defence to include a counter-claim as set out in the draft amended defence and counter-claim annexed.
  - b. That the amended defence and counter claim annexed to the affidavit of Muthiani Charles Munguti Advocate be deemed as properly filed and served upon payment of the requisite Court fees.
  - c. That costs of the application be in the cause.
2. The application is supported by the grounds on its face and the supporting affidavit of Muthiani Charles Munguti Advocate sworn on the same date.
3. The applicant deposed that pleadings have closed and the amendment sought will not prejudice the plaintiff in any way but will enable the Court to determine the real questions/issues. He deposed that there are new developments in the matter and has exhibited a copy of the amended defence and counter-claim.



4. The application is opposed through the respondent's undated replying affidavit filed on 12<sup>th</sup> May, 2021 and his grounds of opposition dated 19<sup>th</sup> April, 2021. The gist of the opposition is that the claim of adverse possession, sought to be introduced by the applicant, is a pure afterthought which has been brought to Court after three and a half years since the institution of the suit. That the application is meant to delay the prosecution of the suit and further derail the realization of justice for the deceased's estate.
5. He deposed that after submission of 4 reports from the survey department, the applicant has realized that he has no defence. The surveyor's reports are exhibited as JMK1. He deposed that adverse possession is not available to the applicant as he has not enjoyed possession of the suit land for 12 years uninterrupted. He deposed that the late Benedicta Kimuma asserted her ownership claims all through till her death in 2015. Letters of grant have been exhibited as JMK2.
6. He deposed that in the defence dated 04<sup>th</sup> December, 2018 and replying affidavit sworn on 04<sup>th</sup> December, 2018, the applicant admitted that the suit land belongs to the deceased and as such, the admission extinguishes any claim of adverse possession. The defence and affidavit are exhibited at JMK3 and 4 respectively.
7. Further, he deposed that on 02<sup>nd</sup> November, 1991, 05<sup>th</sup> April, 2002, 03<sup>rd</sup> July, 2012, 18<sup>th</sup> May, 2016, 30<sup>th</sup> September, 2016 and 13<sup>th</sup> January, 1977 there were disputes over the suit land. The documents for the respective years are exhibited as JMK 5-10 respectively.
8. It is also his deposition that after the death of Benedicta, the applicant attempted to increase the acreage of Makueni/Kilala/469 fraudulently by fixing 3.1 Ha from Makueni/Kilala/485 (suit land). That the applicant proceeded to sub-divide parcel 469 into Makueni/Kilala/924, 925, 926 and 927. The relevant documents are exhibited as JMK11.
9. He deposed that shortly thereafter, the green card for the suit land went missing till 25<sup>th</sup> November, 2020 when it was availed through the Court's intervention.
10. The grounds of opposition have been comprehensively covered in the replying affidavit.
11. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.
12. In his submissions, the applicant relied on the case of *St. Patrick's Hill School Ltd -vs- Bank of Africa Kenya Ltd* (2018) eKLR where the Court of Appeal set out the principles governing the amendment of pleadings as follows:-
  - a. The power of the Court to allow amendments is intended to determine the true substantive merits of the case.
  - b. The amendments should be timeously applied for.
  - c. Power to amend can be exercised by the Court at any stage in the proceedings.
  - d. That as a general rule, however late the amendments is sought to be made, it should be allowed if made in good faith provided that costs can compensate the other side.
  - e. The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint, the defendant would be deprived his right to rely on limitations Act subject however to powers of the Court to still allow an amendment notwithstanding the expiry of the current period of limitation.



13. He has also cited the case of *Central Kenya Ltd –vs- Trust Bank Ltd* (2000) EALR,365 where the Court held that;

“The guiding principle in an application to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no injustice if the other party can be compensated by an appropriate award of costs for any expenses, delay or bother occasioned to him. The main thing is that it can be in the interests of justice that the amendment sought be permitted in order that the real question in controversy between the parties be determined.”

14. He submitted that pre-trial conferencing has not been done and as such, any issues raised in the amendments can be responded to. He also submitted that the 3 ½ years raised by the respondent were spent trying to see whether the parties could amicably resolve the matter out of Court by engaging the Land Registrar.

15. The respondent submitted that the applicant has not met the threshold for adverse possession and has gone further to extensively submit on each of those requirements. I note however that the Court is not determining the issue of adverse possession at this juncture and will therefore desist from delving into the issue.

16. The respondent acknowledges that the applicant’s right in law to apply for leave is incontestable. He however contends that the same law allows the opposing party to oppose or challenge the reasons being advanced for the leave. He submitted that the reasons advanced do not merit the application to be allowed.

17. Having read the application, the replying affidavit and the rival submissions, I do note as follows: -  
Firstly, the applicant has cited a non-existent Order 83 as the basis of his application. The relevant provisions with regard to the amendments sought are;

Order 8 Rule 3(1) which provides;

“Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

Order 8 Rule 3(5) which provides;

“An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

Order 8 Rule 5 which provides;

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”



18. This application was filed approximately two and a half years after institution of the suit but it is noteworthy that the matter was referred to the County Land Registrar and County Surveyor at different times within that period. The assignments of the two offices consumed some considerable time which in my view is a viable explanation for the passage of time.
19. The matter was initially presented as a boundary dispute but the defendant/applicant is now seeking to introduce a new cause of action namely 'adverse possession'. The respondent has opposed the amendment vehemently and is convinced that the same is an afterthought whose sole purpose is to delay justice. While he may be right, the unfortunate bit is that this Court cannot determine such a substantive issue at an interlocutory stage. In my view, the interests of justice will be best served by allowing the parties to table all their issues for determination once and for all. The delay occasioned to the respondent can be adequately compensated by an award of costs.
20. The upshot is that the application is allowed as prayed. The applicant to comply with Order 8 Rule 7 of the Civil Procedure Rules. The respondent has 14 days, from the date of this ruling, to amend, file and serve his pleadings if need be.

**SIGNED AND DELIVERED AT NAROK VIA EMAIL ON THIS 6TH DAY OF JULY, 2022.**

**C. MBOGO**

**JUDGE**

6/7/2022

In the presence of:

CA:T.Chuma

